In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-708

PAUL J. TRAFFICANTE, DOROTHY M. CARR, COMMITTEE OF PARKMERCED RESIDENTS COMMITTED TO OPEN OCCUPANCY, an unincorporated association; THE REVEREND ARTHUR H. NEWBERG, JAMES EMBREE; ALBERT JAMES HEICK, and JAQUELINE TCHAKALIAN,

Petitioners,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a New York Corporation, and PARKMERCED CORPORATION, a California Corporation,

Respondents.

Brief of Respondent Parkmerced Corporation on the Merits

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sented in the action. The Court of Appeals for the Ninth Circuit affirmed dismissal of the complaints herein on the ground that petitioners lacked standing to proceed because they did not allege acts of discrimination against themselves and we ask this Court to affirm.

In addition, Parkmerced Corporation purchased and assumed full control of the Parkmerced complex several months after the date of the complaint. Parkmerced Corporation had no connection with the prior owner, respondent Metropolitan Life Insurance Company. We contend that, if the plaintiffs are granted standing, the action nonetheless must be dismissed against Parkmerced Corporation because it did not participate in or contribute to any of the wrongs complained of in the complaint. This issue was not decided by either court below because these courts found petitioners lack standing.

OPINIONS BELOW

The opinion of the Federal District Court for the Northern District of California dismissing the complaints is reported at 322 F. Supp. 352 (N.D. Cal. 1971) and is set forth as Appendix A hereto. (App. 1-3) The opinion of the Court of Appeals for the Ninth Circuit affirming dismissal is reported at 446 F.2d 1158 (9th Cir. 1971), and is set forth as Appendix A to Petitioners' Brief on the merits, filed herein on or about May 4, 1972.[2] The Court of Appeals denied rehearing on September 13, 1971. (App. 4)

JURISDICTION

See Petitioners' Brief, page 3.

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2. Petitioners' Brief is hereafter cited as "Pet. Br., p. ....".

STATUTES INVOLVED

The statutes involved are Title VIII (Fair Housing) of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601 *et seq.*) and 42 U.S.C. § 1982, the full texts of which are set forth in App. 5-23.

QUESTIONS PRESENTED

I. Whether tenants in a privately owned and operated apartment-complex have standing to maintain an action against their landlord under Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§ 3601, *et seq.*) or 42 U.S.C. § 1982 upon allegations that the landlord engaged in discriminatory housing practices against third parties who are neither joined nor represented in the action and will not be bound or affected thereby?

II. As an alternative ground of decision, whether an independent purchaser of an apartment complex which had no connection with alleged housing discriminations by the seller can be compelled to bear the risks and burdens of litigation of alleged discrimination by the seller, or be subjected to affirmative relief therefor, solely because the purchaser had notice that claims of such discrimination had been made prior to the sale?

STATEMENT OF THE CASE

Since the questions before this Court are whether the petitioners (plaintiffs below) have alleged sufficient facts to show that they have standing to maintain this action, and if so, whether they have stated a cause of action against Parkmerced Corporation, the relevant facts are those in the pleadings. The briefs of other parties provide summaries of the complaints and prior proceedings below, which will not be restated here. However, we wish to call certain facts to the Court's attention.

1. Petitioners Do Not Represent Excluded Persons

Each of the individual petitioners herein (and each member of the petitioner Committee) was at the time of these complaints a resident of Parkmerced. None of the complaints purports to state a class or representative action on behalf of those allegedly excluded from Parkmerced by the discriminatory housing practices complained of.

2. The Complaints Are Based Upon Specific Allegations Of Discrimination Against Third Parties Unconnected With The Action

These proceedings were initiated by petitioners Trafficante and Carr by identical "Housing Discrimination Complaints" filed May 14, 1970, with the United States Department of Housing and Urban Development ("HUD"). Each such administrative complaint recites the facts comprising the violation complained of as follows:

> "I have been injured by discriminatory housing practices against minority group applicants and potential applicants under § 804(a), (b) and (d) of Title VIII of the 1968 Civil Rights Act." (Pet. Br., exhibits annexed to App. C).

Each complaint asserts that such violations occurred "At all times during the past 180 days". (Ibid.)

These sections of Title VIII declare it unlawful to refuse to rent to any person or to make available a dwelling on the ground of race, color, religion or national origin; to discriminate against any person in terms or conditions of rental on such ground; and to misrepresent to any person a dwelling's availability for inspection or rental on such ground. Title VIII is set out in full at App. 5-22.

Petitioners Trafficante and Carr thereafter filed a civil complaint in the District Court under 42 U.S.C. § 3610(d)[3] based upon the same factual allegations as the administrative complaints, copies of which were annexed to the pleading.[4] (Pet. Br., App. C and exhibits thereto). The complaint in intervention thereafter filed by other petitioners is also based upon these same facts. It is in *haec verba* to the Trafficante and Carr complaint and, as petitioners state, is ". . . identical in all material respects . . .", except that the intervening plaintiffs did not proceed by administrative complaint under 42 U.S.C. § 3610 (Pet. Br., p. 4, fn. 2).

3. The Pendency Of A Companion Case

Within two weeks after the entry of judgment by the District Court dismissing the complaints, and immediately after petitioners filed their notice of appeal to the Court of Appeals, petitioners' attorneys, again acting on behalf of the San Francisco Lawyers Committee for Urban Affairs, filed a separate action in the same District Court, against the same defendants, claiming virtually identical housing discriminations (*Burbridge, et al. v. Parkmerced Corporation, et al.,* (N.D. Cal. No. C-71-378) filed February 25, 1971; a copy of this complaint is annexed as App. 24-33). The charging portions of the complaint in *Burbridge* are substantially the same as those in the case at bar, with the

3. 42 U.S.C. § 3610(d) provides that, if HUD shall not resolve the administrative complaint within a specified time, the complainant may bring a civil action to ". . . enforce the rights granted or protected by [Title VIII], insofar as such rights relate to the subject of the complaint [to HUD] . . ."

4. The civil complaint also purports to state causes of action under 42 U.S.C. § 3612 and 42 U.S.C. § 1982 based, however, upon the same factual allegations as the claim under § 3610(d) (Pet. Br., App. C at p. 6).

exception of immaterial additions reflecting Parkmerced Corporation's purchase of the properties.[5]

Burbridge differs from the case at bar in two vital respects. First, the plaintiffs in *Burbridge* allege that they personally were denied the opportunity to rent or make application to rent dwellings at Parkmerced and, second, the *Burbridge* plaintiffs bring their action as a class action under F.R.Civ.P. 23 purportedly on behalf of and binding upon all members of minority groups against whom the respondents allegedly have discriminated. Metropolitan and Parkmerced Corporation have answered the *Burbridge* complaint without challenging the standing of those plaintiffs to maintain suit. The propriety of class representation has not yet been judicially determined.

4. Parkmerced Corporation Had No Connection With Metropolitan's Operation Of Parkmerced During The Complaint Period And Has Assumed Full Control Of The Complex

On December 21, 1970, more than seven months after the initial complaint to HUD (and two months after the last complaint in intervention), Metropolitan sold its interest in the Parkmerced complex to Parkmerced Corporation, a California corporation recently formed for the purpose of acquiring the complex. The transaction took the form of an outright sale of buildings, structures and improvements, including tenant leases, and a thirty-year lease of the underlying ground, with options in Parkmerced Corporation to renew the ground lease for three additional fifteen-year terms. Metropolitan granted a purchase money

5. The *Burbridge* complaint recites that, prior to the purchase, Parkmerced Corporation ". . . had knowledge of the allegations of racial discrimination contained hereby [sic] by virtue of their familiarity with the case of *Trafficante, et al. v. Metropolitan Life Insurance Company* (No. C-70-1754 [RHS] . . ." (App. D, para. 10 at App. 28).

mortgage for a portion of the purchase price and obtained a security interest in improvements, personal property and lease revenues (Kilmartin Affidavit, R. Ex. K.).[6] Copies of the contract of sale, lease, mortgage and various letter agreements were filed as exhibits in the trial court. By the terms of these agreements, ownership of Parkmerced and control of its leasing and operating policies passed entirely to Parkmerced Corporation and Metropolitan has retained no interest in or control of operational policies.[7]

On January 5, 1971, two weeks after the Parkmerced sale, petitioners amended their complaints to state their cause of action against Parkmerced Corporation. Petitioners demand that Parkmerced Corporation provide broad affirmative relief to remedy the alleged unlawful racial imbalance at Parkmerced and otherwise to correct the effects of discriminations allegedly practiced by Metropolitan (Pet. Br., App. C at p. 7 and App. D at p. 3). The sole bases stated for imposing such a burden upon Parkmerced Corporation are: (i) that prior to the purchase, Parkmerced Corporation knew of this litigation; (ii) the assertion, upon information and belief, that in its first two weeks of ownership Parkmerced Corporation did not make

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6. The reference "R.Ex. ...." refers to exhibits contained in the certified record herein.

7. Petitioners' amended complaints contain the unsupported and erroneous assertion that these companies ". . . made certain further agreements contemplating concerted future actions by them with respect to the operation and ownership of Parkmerced." (Pet. Br., App. D. at para. 1(d)). The lease and mortgage contain normal provisions for the protection of Metropolitan's mortgage and ground lease interests. Side agreements provide for additional financing from Metropolitan of certain capital improvements and for adjustment of debt and ground lease relationships upon the possible future transfer of ownership of all or a part of the premises by Parkmerced Corporation. The sole provision which might affect Parkmerced Corporation's independent operational control is a provision of the ground lease that Metropolitan, for "cause", can require Parkmerced Corporation to select and appoint an independent property manager.

substantial changes in business operations or policies at Parkmerced; and (iii) the assertion, also upon information and belief, that Parkmerced Corporation intends to retain Metropolitan's employees at the project and does not intend to make substantial changes in operations or policies.[8]

SUMMARY OF ARGUMENT

I. Petitioners Lack Standing Under Title VIII

Petitioners lack standing because they are not appropriate persons to litigate the claimed denial of rights to third persons who they allege were excluded from the Parkmerced complex in violation of Title VIII (42 U.S.C. §§ 3601 *et seq.*). The doctrine of standing has developed from the limitation in Article III of the Constitution of the judicial power to "Cases" and "Controversies" and requires that the party present a genuine dispute, adversary in nature, and that the party be in a position to adequately present and finally determine the controversy. Plaintiffs lack standing here because Title VIII does not create a private right of action in persons who are not themselves the objects of discriminatory housing practices directly and personally injured thereby and because petitioners are not persons appropriate to assert the rights of absent third parties. Litigation of the wrongful exclusion of others by these petitioners would be inconclusive, in that the persons whose rights are at issue are neither present nor represented in the action and would not be bound or affected thereby.

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8. The amended complaints state that this last assertion is made "[o]n the basis of . . ." two letters, dated the date of the sale, directed to residents of Parkmerced for the purpose of informing them of the change of ownership and that their tenancies would not be affected. (Pet. Br., App. D, para. 4 at p. 3; the letters are annexed as exhibits to Pet. Br., App. D) The letters cannot be read as an admission that Parkmerced Corporation intended to undertake or continue a scheme of discrimination.

Title VIII proscribes "discriminatory housing practices" which are specifically defined in the Act.[9] Title VIII applies to a broad range of real estate transactions including the sale, lease or financing of a private dwelling.[10] The complaints allege violations of 42 U.S.C. §§ 3604(a), (b) and (d) which, as here pertinent, declare it unlawful to refuse to rent or to make unavailable a dwelling to any person who makes a *bona fide* offer on the ground of race, color, religion or national origin; to discriminate against any person in the terms, conditions or privileges of rental on such grounds; and to misrepresent the availability of a dwelling to any person on such grounds. The "person aggrieved" by such a discriminatory housing practice may complain to HUD which will attempt to resolve the dispute by conciliation.[11] The aggrieved person may file a civil action to enforce his rights if conciliation by HUD is ineffective[12] or may bring a civil action without prior complaint to HUD.[13] In either case, the initial complaint must be made within 180 days after the alleged violation occurred.[14] Title VIII also provides that the Attorney General may bring a suit, without reference to a specific period of limitations, to attack a "pattern or practice" of resistance to the rights granted by the Act, or the denial of such rights to a group of persons which raises an issue of "general public importance."[15]

These provisions, which proscribe specifically defined acts of discrimination against persons who seek to buy, rent

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9. 42 U.S.C. §§ 3602(f), 3604-06.
10. 42 U.S.C. § 3603.
11. 42 U.S.C. § 3610.
12. 42 U.S.C. § 3610(d).
13. 42 U.S.C. § 3612.
14. 42 U.S.C. §§ 3610, 3612.
15. 42 U.S.C. § 3613.

or finance housing, and which limit the right of complaint or suit to a short limitations period, are inconsistent with the creation of a generalized public right to sue to create an integrated environment which petitioners demand. The "pattern or practice" provisions cannot be construed to create a private right of action. While the legislative history of Title VIII does not deal directly with the question of standing, the comments of sponsors and other legislators are most consistent with a Congressional intent to create only specific personal rights of action in persons who claim that they were discriminated against.

While in recent years the law of standing has been liberalized in connection with attempts by private citizens to secure review of governmental agency action, such cases do not require that private litigants in the position of petitioners be granted standing to maintain suit against other private persons. The policy considerations which support a citizen's standing to challenge the regularity and correctness of government action are irrelevant here and, in any event, this Court continues to require a showing of direct personal injury flowing from the challenged conduct, which petitioners here have not shown. *Sierra Club v. Morton*, ... U.S. ....., 92 S.Ct. 1361 (1972). Other authorities relied upon by plaintiffs arise under the labor and employment laws or public accommodations laws which differ materially from Title VIII. In almost all cases, the persons bringing suit allege that they themselves have been directly and personally injured by the defendant's conduct placed at issue.

Petitioners in effect seek to assert the rights of third persons, those who allegedly were excluded from Parkmerced. Petitioners bear no particular or special relationship to the persons whom they purport to represent and such persons are not disqualified from suit nor denied a forum to assert

their rights. Contrast *Eisenstadt v. Baird,* ..... U.S. ....., 92 S.Ct. 1029 (1972). To the contrary, persons allegedly excluded from Parkmerced have in fact brought a companion case to that at bar in the form of a class action purporting to represent all those excluded on grounds of race or color (*Burbridge, et al., v. Parkmerced Corp., et al.,* discussed at pp. 5-6, *supra.*)

Title VIII provides that a successful plaintiff may be awarded costs, attorneys' fees and up to $1,000 punitive damages.[16] There should be no concern, that if petitioners' standing is denied, proper plaintiffs to secure the rights granted by Title VIII will not emerge.

II. Petitioners Lack Standing Under 42 U.S.C. § 1982

This Section was enacted in 1866 and is broad and declaratory in terms:

> "Section 1982. *Property rights of citizens.* All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." (42 U.S.C. § 1982)

Standing to sue under this statute has been accorded to persons who have been directly injured by the deprivation of their property rights, but has never been construed to provide a right of action in persons whose rights have not been so deprived. The reasons for the denial of petitioners' standing under Title VIII are equally applicable to 42 U.S.C. § 1982, in that the petitioners seek to litigate the claims of absent third parties and the litigation would be inconclusive and ineffective to bind the persons whose rights are at issue.

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16. 42 U.S.C. § 3612(c).

III. As An Alternative Ground Of Decision, The Action Should Be Dismissed Against Parkmerced Corporation Because It Did Not Participate In Any Of The Wrongs Complained Of

Parkmerced Corporation purchased the Parkmerced complex from Metropolitan many months after the transactions complained of in the complaint. Parkmerced Corporation had no connection with Metropolitan's conduct of the premises and it has assumed independent control of rental policies at Parkmerced. Petitioners claim that Parkmerced Corporation should be required to litigate the merits of their claims and be subject to affirmative relief to remedy alleged racial imbalances at Parkmerced and to cure the effects of alleged past discriminations. The basis for subjecting Parkmerced Corporation to the burden and risks of litigation and to affirmative relief is that Parkmerced Corporation had notice of petitioners' complaints herein.[17]

It is both improper and unfair to hold Parkmerced Corporation as a party or subject it to relief. Title VIII and 42 U.S.C. § 1982 proscribe specific discriminatory conduct, none of which is attributed to Parkmerced Corporation by the complaints. Neither Title VIII nor 42 U.S.C. § 1982 purports to impose a kind or degree of racial or other integration which must exist at an apartment complex. Parkmerced Corporation should remain free to operate Parkmerced as it desires, so long as it does not itself engage in discriminatory housing practices.

The fact that Parkmerced Corporation had notice of the charges is of no moment. Metropolitan has denied the charges. While Parkmerced has obtained indemnification against the costs of suit, there is no practical means by which it through agreement with Metropolitan could insulate itself from the adverse consequences of the dislocations

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17. Other bases adverted to in the complaint are patently without substance (see pp. 6-8, *supra*).

of its affairs and disparaging publicity which will arise from its joinder in the suit or from the adverse consequences of the broad affirmative relief which petitioners demand. A rule subjecting innocent purchasers to such liabilities because they had notice of unadjudicated claims would provide claimants an opportunity to hamper severely or frustrate real estate transactions by the filing of claims, whether made in good faith or not. These results are unwarranted and not required by either statute.

ARGUMENT

I. Tenants In A Privately Owned Apartment Complex Do Not Have Standing To Maintain An Action Challenging Alleged Discriminatory Housing Practices Directed Against Others

The doctrine of standing has developed as a rule of judicial discretion and restraint to limit the range and kinds of persons entitled to require courts to adjudicate issues raised by a complaint. The doctrine has its origin in the limitation of the judicial power to "Cases" and "Controversies" in Article III of the Constitution and in its essence requires that the dispute be genuine, that the proceeding be adversary in its nature and that the party claiming standing be in a position to represent adequately and determine authoritatively the rights and interests to be decided in the case. *Flast v. Cohen*, 392 U.S. 83, 94-106 (1968). As this Court stated in *Flast v. Cohen*:

> "Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. It is for the reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' *Baker v. Carr, supra*, 369 U.S. at 204, 82

S.Ct. at 703, and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' *Aetna Life Insurance Co. v. Haworth, supra,* 300 U.S. at 240-241, 57 S.Ct. at 464." (392 U.S. at p. 101).

Standing requires that, at the outset of a case, the plaintiff demonstrate that it has a direct, personal interest in resolution of the issues to be adjudicated and that the plaintiff be in a position to present the relevant issues with "... that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult . . . questions", *Baker v. Carr,* 369 U.S. 186, 204 (1962); Cf. *Sierra Club v. Morton,* .... U.S. ...., 92 S.Ct 1361 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970).

By their complaints, petitioners seek to litigate the question whether third parties were wrongfully excluded from Parkmerced. Petitioners cannot be granted standing under Title VIII because they do not have a direct, personal stake in the outcome of the issues to be tried, they do not present claims having the required concrete adverseness and the litigation by them would be inconclusive and ineffectual to bind or affect the persons whose rights are claimed to have been denied.

The question here, narrowly stated, is whether the petitioners are "persons aggrieved" within the intendment of 42 U.S.C. §§ 3610(a) and 3612, which confer upon those "aggrieved" a right of action. A mere claim of injury, indignation or loss does not, without more, suffice to demonstrate standing. This Court must analyze the substantive rights created by Title VIII, the violations claimed in the complaints, and the nature of the issues made relevant and to be resolved in order to determine whether petitioners are appropriate plaintiffs to advocate the same. We submit that petitioners are not.

A. TITLE VIII CREATES SPECIFICALLY DEFINED RIGHTS OF ACTION IN PERSONS DISCRIMINATED AGAINST, BUT NOT THE GENERAL RIGHT TO MAINTAIN SUIT CLAIMED BY PETITIONERS

Petitioners argue that this Court should allow standing to the broadest range of potential plaintiffs because Title VIII expresses a policy of "fair housing throughout the United States" (42 U.S.C. § 3601; Pet. Br., pp. 15-18). However, such a general statement cannot answer the question whether Congress intended to enforce that policy by entitling tenants in a privately owned apartment complex to maintain judicial proceedings upon supposed acts of discrimination against third parties. Neither the language of the Act nor the legislative history supports such a conclusion.

1. The Language Of Title VIII

Title VIII is specific and exact as to the acts and practices, defined as "discriminatory housing practices", declared unlawful (42 U.S.C. § 3602(f)). The practices declared unlawful are discrimination against any person in the sale or rental of housing, in the financing of housing and in the provision of real estate brokerage services (42 U.S.C. §§ 3604-06). With certain exceptions not here relevant, Title VIII is made applicable to a wide range of real estate transactions, including the sale or rental of a single family house through a broker or agent (42 U.S.C. § 3603).

A "person aggrieved",[18] may complain to the Secretary of HUD. The Secretary is required, in certain cases, to refer the complaint to appropriate local agencies, and is empowered to attempt to resolve the complaint by ". . . in-

18. Defined as "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . ." (42 U.S.C. § 3610(a)).

formal methods of conference, conciliation, and persuasion" (42 U.S.C. §§ 3610(a), (c)). If within thirty days after the complaint is filed with the Secretary, or after the expiration of a period of reference to local authorities, the Secretary has been unable to obtain voluntary compliance, the person aggrieved may commence an action in the Federal District Court (42 U.S.C. § 3610(d)). A complaint under 42 U.S.C. § 3610(a) must be "verified" and is required to be filed within 180 days after the alleged discriminatory housing practice occurred (42 U.S.C. § 3610(b)).

The Act provides an alternative private right of civil action to enforce "[t]he rights granted [under the Act] . . . " and specifically contemplates that civil action will be grounded upon a claimed "discriminatory housing practice" (42 U.S.C. § 3612). Action under this Section is available without prior complaint to HUD.

Title VIII also provides that the Attorney General may bring a civil action in the District Court,

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance . . ." (42 U.S.C. § 3613).

This Section contains no express limitations period. The Attorney General's right of action under this Section is independent of the rights accorded private litigants and the elements of proof necessary to establish a "pattern or practice" in violation of 42 U.S.C. § 3613 differ materially from those applicable to private suits. *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971).

As discussed at pp. 25-26, infra, this Section does not create any private right of action.

Thus, in creating a private right of action under Title VIII, Congress proscribed specifically defined "discriminatory housing practices" and required that a complaint be brought upon a verified complaint within 180 days after the act occurred. The specific violations claimed by petitioners are that, within the 180-day period prior to May 14, 1970, Metropolitan engaged in discriminatory housing practices against unidentified third parties. The factual and legal issues presented by these claims will be whether Metropolitan, during the relevant period: refused to rent or to negotiate for the rental of a dwelling to any person because of that person's race, color, religion or national origin; or discriminated against any person in the terms, conditions or privileges of rental, or in the provision of services or facilities in connection with rental, on such grounds; or misrepresented to any person the availability of a dwelling for inspection or rental on such grounds. Determination of these questions would require detailed inquiry at trial into what persons made application to Parkmerced during such 180-day period; what each such applicant communicated to the Parkmerced staff and what such staff communicated to the applicant; whether the applicant presented himself in such manner as to demonstrate his qualification under objective financial and other non-racial criteria established by Metropolitan; whether his offer to rent was "bona fide" (42 U.S.C. § 3604(a)); and, in each case, whether any refusal to accept an application for rental, or to rent, or any misrepresentation as to availability of a dwelling, or discrimination in terms of rental, if it occurred, was in fact done or made because of such person's race, color, religion or national origin.

If the case at bar should proceed to trial, these would be the central issues to be determined. However, none of the petitioners herein was the object or victim of any of the claimed discriminatory housing practices, and none appears to have been in any way a participant in or connected with the alleged violations. None of the persons alleged to have been excluded or discriminated against is a party to this proceeding, or even identified or referred to in the complaint.

2. Legislative History Of Title VIII Does Not Support Petitioners' Standing To Sue

The legislative history of Title VIII is sparse but, to the extent the question of standing was adverted to, the history is most consistent with the grant of standing only to persons discriminated against.

The question is whether Congress intended to deal with segregated housing by empowering plaintiffs such as petitioners to maintain suit. As the Ninth Circuit Court of Appeals stated in its opinion below, the language of the Act and statements in Congressional debates show with clarity that Congress intended to confer rights of action upon private individuals who were the direct victims of discriminatory housing practices and brought timely suit within 180 days after the violation occurred (42 U.S.C. §§ 3610, 3612), and to empower the Attorney General to challenge a "pattern or practice of resistance to the full enjoyment" of rights secured by the Act (42 U.S.C. § 3613), but nothing in the legislative history indicates that Congress contemplated that private individuals would be entitled to maintain suit because they are dissatisfied with the degree of integration or racial makeup of their community and believe that rights have been denied to others.

Thus, although in the House and Senate debate reference was made to the effects on society as a whole of segregated housing (Pet. Br., at p. 20), by far the greater emphasis by proponents of the bill was on concrete examples of black individuals who had been discriminated against and whose rights and dignity had been offended by such discrimination.[19] The acts of discrimination set forth in 42 U.S.C. § 3604 concretely express the Act's emphasis on the individual who has been discriminated against as the key to the enforcement of the congressional policy against discrimination. The importance of these individual acts of discrimination is further underscored by the 180-day statute of limitations—a reflection of an intent that issues be presented concretely by those directly affected.[20]

Without in any way denying the crucial role in the enforcement of the Act played by private plaintiffs who have been objects of discrimination, Parkmerced Corporation, cannot agree with the petitioners' and with the United

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19. See Congressional Record Vol. 114 Nos. 3 and 4 debate on H.R. 2416. Said Senator Javits: "[F]or all the reasons I have described, and particularly because it relates so directly and, indeed, so poignantly to the dignity of the individual who is affected by the denial of housing opportunity and the right to live where he and his family choose to live, that fair housing legislation is needed." 114 Cong. Rec. 2706.
Senator Hart stated "The fellow who should be on the floor of the Senate urging us to adopt the housing bill is a Negro—a Negro who . . . seeks to give his children the opportunity to live in a better neighborhood." 114 Cong. Rec. 3247.
Senator Mondale referred, on several occasions, to witnesses who had appeared before the subcommittee at hearings on discrimination in housing: "Two of our witnesses, Negroes who could not buy suitable housing, were typical. One was a Navy Lieutenant with 8 years of experience . . . [T]he other was a distinguished professor of literature . . . Both of them had spent months going to homes which had "For Sale" signs out in front . . . only to be rejected, . . . simply because of their color." 114 Cong. Rec. 293. See also speeches by Senators Kennedy, Proxmire, Brooke, and Hatfield in support of H.R. 2516 in Vol. 114 Cong. Rec. Nos. 3 and 4.

20. 42 U.S.C. § 3610(b).

States' position in its amicus brief that the Congressional debates indicate an intention to make standing to enforce the Act extend to those in petitioners' positions[21].

In one of the few explanations of details of the bill, Senator Mondale, who with Senator Brooke sponsored the amendment to H.R. 2516 which contained the fair housing provisions, submitted a series of questions and answers on the bill. The response to the question of how the Act would be enforced contained the statement: "Persons who believe they have been discriminated against may file a charge with the Department [HUD]. If the Department decides to process the charge, it will so notify the person. If it decides not to, or fails to give notice within 30 days, the person can bring his own action in any court of competent jurisdiction."[22] The Dirksen Amendment which was eventually substituted for the Mondale amendment and which was the final form of the bill, somewhat reduced the role of HUD and gave persons who have been discriminated against the option of going directly to court (42 U.S.C. § 3612). There is, however, no change in the language of "persons aggrieved" and no mention in later speeches

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21. The Government's interpretation of the legislative history of the Act is particularly tenuous. For example, the Government states:

"It is noteworthy too that the only specific objection to the standing provision voiced in either the House or the Senate was that it was too broad." (Amicus Br., text at fn. 29, p. 16).

The footnote indicates that this statement refers to comments made by Representative Pucinski. In fact, Representative Pucinski's criticism of the enforcement provisions went to the fact that a right of action is accorded to those who believe they *will be* injured by an action that is about to occur. "No other law provides such a broad basis for action even before a discriminatory act actually occurs." Mr. Pucinski also objected to the broad powers the Act gave federal officials in the local community. 114 Cong. Rec. 9603-04.

22. 114 Cong. Rec. 2273.

supporting the bill that the original purpose, described by Senator Mondale, of enforcement by "persons who believe they have been discriminated against" had been changed.[23]

We submit that it is impossible to find in this legislative history support for petitioners' position that they have the right to relief under the provisions of Title VIII. A Congressional intent to extend to those not the direct objects of discrimination the right to challenge the alleged acts of discrimination cannot be inferred merely from the failure of Congress to state *specifically* that they do not have standing. This Court should require a clearer expression of legislative intent than mere silence before it permits the extension of standing to sue which petitioners seek in this case of first impression.[24]

8. THE SUGGESTION OF THE ASSISTANT REGIONAL ADMINISTRATOR OF HUD THAT PETITIONERS HAVE STANDING UNDER TITLE VIII IS NOT ENTITLED TO WEIGHT

Petitioners argue that HUD "determined" that they are "persons aggrieved" under Title VIII and that this determination is entitled to great deference and weight (Pet.

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23. Senators Mondale and Brooke in moving to table their own amendment so that Senator Dirksen's might be substituted stated that ". . . the essential difference between the Mondale-Brooke amendment and the amendment about to be introduced" was that their amendment covered 7 million more housing units than did Senator Dirksen's. 114 Cong. Rec. 4568. No mention of change in standing to enforce the Act was made.

24. It is noteworthy that, where Congress intended to create a general right of action in the public to secure certain civil rights, it had no difficulty in drafting legislation which specifically and clearly so provides. See, for example, the public accommodations provisions of The Civil Rights Act of 1964, which provide that "[a]ll persons shall be entitled to the full and equal enjoyment of . . . facilities . . . without discrimination or segregation . . ." (42 U.S.C. § 2000(a)). See *Bailey v. Patterson*, 369 U.S. 31 (1962), upholding a right of action in those who are the users of public accommodations.

Br., p. 21). This "determination", which followed a discussion between petitioners' counsel and the Assistant Regional Administrator of HUD, is contained in a letter from the Assistant Regional Administrator to petitioners' counsel, dated November 5, 1970, reporting the status of HUD's investigation.[25]

As this Court observed in *Skidmore v. Swift*, 323 U.S. 134, 140 (1944):

> "The weight of [an administrative determination] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

It is apparent from the face of the letter that the HUD investigation had been stalled by personnel shortages. The "determination" of standing was made *ad hoc* by the regional HUD office upon incomplete investigation and with-

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25. The text of the letter (Ex. D to R. Ex. J) is as follows:

"Subject: Trafficante, Cooney and Carr (VI-70-5-155, VI-70-5-156, VI-70-5-157) vs. Park Merced Metropolitan Life Ins. Co.

This letter is to inform you of the status of the complaint of your above mentioned clients. As was explained to you in previous conversations with Marvin R. Smith and Robert Jeffrey of this office, our efforts have been hindered by the acute manpower shortage and the overwhelming caseload which we have experienced. I assure you that the matter is still under investigation and efforts are being exerted to resolve the dispute expeditiously.

As previously discussed with you, it is the determination of this office that the complainants are aggrieved persons and as such are within the jurisdiction of Title VIII of the 1968 Civil Rights Act.

I appreciate your cooperative efforts in this matter.

Sincerely,

Clifton R. Jeffers
Assistant Regional Administrator"

out communication with respondents or an opportunity for either of them to be heard. None of the factors of reliability and persuasiveness referred to in *Skidmore* is present.

HUD's comment on standing is gratuitous, in that it was not made in the course of administrative adjudication or rulemaking. HUD is granted broad investigative powers. The fact that HUD evidences willingness to accept a complaint for purposes of investigation cannot be equated with an adjudicative determination that these petitioners have standing to maintain federal court proceedings.

C. DENIAL OF STANDING TO PETITIONERS HEREIN WILL NOT IMPAIR THE EFFECTIVE REALIZATION OF RIGHTS SECURED BY TITLE VIII

Petitioners and the Solicitor General suggest that, unless standing is allowed here, enforcement of Title VIII will be crippled and the role of private citizens to proceed as "private attorneys general" to vindicate public interests and to attack "patterns or practices" of discrimination will be gravely impaired. None of these contentions has merit.

1. Title VIII Provides Material Incentives To Suit, And Persons Claiming They Were Discriminated Against Have In Fact Brought Suit

Title VIII provides the incentives of the award of actual damages, affirmative relief and discretionary punitive damages, court costs and attorneys' fees which will ensure active pursuit of their rights by persons who believe they have been discriminated against (42 U.S.C. § 3602(c)). Such persons are neither disabled from suit nor denied a forum[26] and there is no reason to conclude they will not enforce their rights. As noted at pp. 5-6, *supra*, while the appeal herein was pending before the Circuit Court, peti-

26. Compare *Eisenstadt v. Baird*, ... U.S. ....., 92 S.Ct. 1029 (1972), discussed at page 33, *infra*, in which the persons whose rights were denied were not subject to prosecution and "... to that extent, are denied a forum in which to assert their own rights." (92 S.Ct. at p. 1034).

tioners' attorneys filed the complaint in *Burbridge, et al. v. Parkmerced Corporation, et al.*, upon virtually identical allegations of racial discrimination at Parkmerced. The plaintiffs in *Burbridge* are five Negroes who claim that they personally were excluded from Parkmerced by acts of discrimination and they bring suit purportedly on behalf of a class of all persons similarly situated.

2. The Role Of Private Citizens To Proceed As "Private Attorneys General" Will Not Be Affected

We do not dispute that private plaintiffs have an important role in the enforcement of Title VIII, or that such plaintiffs, in appropriate cases, proceed as "private attorneys general" vindicating important public interests. However, we have encountered no case in which a plaintiff is entitled to proceed, as a "private attorney general" or otherwise, unless that plaintiff claims direct personal injury to him and demonstrates concrete adverseness on the issues to be litigated.

The question whether public interests beyond the plaintiff's private claim are involved is wholly distinct from the question whether the plaintiff's relation to the controverted issues raised by the complaint is within recognized bounds of standing. The suggestion that petitioners here must be accorded standing as quasi-attorneys general is no more than an argument that petitioners should have standing because they seek the kind of relief which an appropriate plaintiff might seek. Such an argument misconceives the function of standing to limit court proceedings to plaintiffs with the appropriate direct interest in the issues to be determined.

The private attorney general role is similar to that of a class action plaintiff, and courts have been strict in pro-

tecting the public interests represented by a plaintiff whose standing is clear.[27]

In short, the plaintiff who "takes on the mantle of the sovereign" (*Jenkins v. United Gas Corp.*, 400 F.2d 28, 32 (5th Cir. 1968)) is always one whose relation to the immediate controversy is well within the recognized bounds of standing.

2. Denial Of Standing To These Petitioners Will Not Frustrate Or Impair Attacks Upon "Patterns Or Practices" Of Discrimination

Both petitioners and the Solicitor General suggest that petitioners and other private plaintiffs have standing to challenge a "pattern or practice" of discrimination. As a matter of statutory construction, it would appear clear beyond question that 42 U.S.C. § 3613 does not confer a private right of action upon individuals and that a private complaint which alleges no more than a "pattern or practice" of discrimination sufficient to sustain action by the Attorney General would necessarily be dismissed for failure to state an actionable claim.

Title VIII provides that the Attorney General may bring a civil action to challenge a ". . . pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Act] . . ." or the denial of rights to a "group" raising

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27. For example, courts have decided that subsequent satisfaction of the original plaintiff's claim did not moot all of the individual grievances or those of the class he represented, *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); or that when a class action based on employer discrimination claims was properly brought, those subsequently joined need not have submitted their individual grievances to the E.E.O.C., *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) and *Madlock v. Sardis Luggage Co.*, 302 F. Supp. 866 (N.D. Miss. 1969); or that use of union grievance arbitration tolls the statute of limitations for filing an E.E.O.C. claim, *Hutchings v. United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); or that a poorly filled out E.E.O.C. complaint subsequently amended is no bar to an action, *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).

an issue of "general public importance" (42 U.S.C. § 3613). The Attorney General's right of action under this Section is independent of the right of private suit. It is not subject to an express limitations period. The elements of proof necessary to establish a "pattern or practice" differ materially from those applicable to private suits. *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971); *United States v. Bob Lawrence Realty, Inc.*, 313 F. Supp. 870 (N.D. Ga. 1970); *United States v. Mintzes*, 304 F. Supp. 1305 (D. Md. 1969).

The fact that a proper private plaintiff whose standing to sue is clear may in appropriate circumstances maintain a class action or obtain broad affirmative relief does not place a private plaintiff in the position of the Attorney General to maintain a "pattern or practice" suit under 42 U.S.C. § 3613.[28]

D. THE LEGAL AUTHORITIES CITED BY PETITIONERS DO NOT SUPPORT THEIR STANDING TO MAINTAIN A PRIVATE SUIT UNDER TITLE VIII TO LITIGATE THE RIGHTS OF ABSENT THIRD PARTIES

Petitioners rely upon a broad range of cases, each of which is distinguishable from and inapposite to the case at bar. They rely upon cases in which citizens and citizen groups have been allowed standing to challenge agency action of government officials; cases in which the plaintiffs (whether or not minority persons) suffered direct and immediate personal injury of the kind which the applicable

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28. For these reasons, the criticism advanced by the Solicitor General and by petitioners of the statement of the Ninth Circuit Court of Appeals that the Act grants to the Attorney General, and not private plaintiffs, the right to sue to correct "patterns and practices" of discrimination is not well taken (Pet. Br., App. A, at pp. 6-7; see Pet. Br., p. 29; Amicus Brief of the United States, at p. 20). The Court's statement cannot be construed as suggesting that, if a "pattern or practice" exists, a private plaintiff who otherwise would have a perfected right of action under 42 U.S.C. §§ 3610 or 3612 is disabled from suit.

statute was designed to prevent; cases in which plaintiffs, for policy reasons not here applicable, were found entitled to assert the rights of others; and cases arising under the public accommodations provisions of the 1964 Civil Rights Act, or under the equal employment and labor laws, which involve particular legislative policies and statutory language unlike that presented here. These lines of authority are discussed below and involve factual situations, statutes and judicial and legislative policy considerations different from and wholly inapplicable to those at issue.

1. Cases Involving A Citizen's Challenge To Governmental Agency Action

The bulk of the cases relied upon by petitioners are cases where the court found that private citizens and citizen groups have standing to challenge agency and other action of government officials upon allegations that such officials have failed either to perform duties imposed by law or properly to take account of public interests which such officials are required by law to protect.[29]

These cases reflect a policy to permit private suit in order to insure the competence, regularity, fairness and

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29. E.g., *Sierra Club v. Morton*, ... U.S. ....., 92 S.Ct. 1361 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Carter v. Greene County*, 396 U.S. 320 (1970); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Flast v. Cohen*, 392 U.S. 83 (1968); *Rogers v. Paul*, 382 U.S. 198 (1965); *Kennedy Park Homes Association, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. den.*, 401 U.S. 1010 (1971); *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970); *Wheeler v. Durham City Board of Education*, 363 F.2d 738 (4th Cir. 1966); *Sisters of Providence of St. Mary of the Woods v. City of Evanston*, 335 F. Supp. 396 (N.D. Ill. 1971); *Hobson v. Hansen*, 320 F. Supp. 409 (D.D.C. 1970); *Marable v. Alabama Mental Health Board*, 297 F. Supp. 291 (M.D. Ala. 1969); *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (N.D. Ala.), *aff'd per curiam*, 389 U.S. 215 (1967); *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), *cert. den.*, 384 U.S. 941 (1966); Cf. *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

correctness of governmental agency actions. Such action typically affects large segments of the business and social community and often involves the carrying out of plans and programs whose effects pervade the community and may be irremediable. For example, in *Sierra Club v. Morton*, ... U.S. ....., 92 S. Ct. 1361 (1972) and *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), *cert. den.*, 384 U.S. 941 (1966), the controversy centered on the environmental, ecological and social impact of wilderness and river development plans whose effects, if carried out, at least arguably, could not be reversed or restored within a millennium. In many cases, the adverse impact of the agency action is generalized throughout all or a large segment of society and the direct, personal injury to any complainant may be barely perceptible (e.g., *Flast v. Cohen*, 392 U.S. 83 (1968)). But, unless concerned citizens are allowed standing, these important social interests may have no spokesman at all and there may be no effective check upon abuses by government officials (e.g., *United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966)). Notwithstanding, this Court continues to require a strict showing of direct, personal injury as a prerequisite to suit (*Sierra Club v. Morton, supra*).

Recent cases in this Court have concerned standing to review government agency action, and have not concerned the question of standing of private plaintiffs to maintain suit against other private persons.[30] While these cases provide guidance as to the "Case" or "Controversy" limits of the judiciary's Article III powers, they do not determine the case at bar. In applying these cases, lower courts have

30. See, for example, *Sierra Club v. Morton, supra; Flast v. Cohen, supra; Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Investment Company Institute v. Camp*, 401 U.S. 617 (1971).

emphasized that their broad impact is restricted to the review of agency action. For example, in *Connecticut Action Now, Inc. v. Roberts Plating Co., Inc.*, 457 F.2d 81 (2d Cir. 1972), the Court of Appeals denied standing to private citizens to bring injunctive proceedings against an alleged polluter of navigable waters. The applicable federal statute placed the duty to conduct such proceedings in the Department of Justice (Compare 42 U.S.C. § 3613). The Court distinguished *Data Processing, Scenic Hudson,* and similar cases on the ground that they involved challenges to government action, and explained:

> "It is one thing to reduce the showing of legal wrong, adverse effect, or aggrievement (see 6 U.S.C. § 702) when a citizen seeks judicial scrutiny of actions proposed to be taken by the Government, and quite another to allow one citizen to bring suit on behalf of the general public against a private individual who has done no more harm to him than to all the others comprising the public. In the former case, the question is who may ask the courts to keep Government itself within lawful bounds. The latter deals with the separate issue of who may represent the public in seeking to confine private individuals within the law. To allow any citizen to perform that function, normally fulfilled by the Government, would obviously raise grave problems for equal, fair, and consistent law enforcement." (457 F.2d at pp. 89-90).

See also *Solien v. Misc. Drivers and Helpers Union, Local No. 610,* 440 F.2d 124, 132 (8th Cir.), *cert. den.*, 403 U.S. 905 (1971) in which the Court of Appeals affirmed denial of standing to the employer-company to intervene or otherwise be a party to injunctive proceedings by the N.L.R.B. against a union. The Court analysed *Data Processing* and its companion case, *Barlow v. Collins,* 397 U.S. 159 (1970), in the following terms:

> "Both *Data Processing* and *Barlow* presented the question of what interest one must allege in order to establish that he is sufficiently aggrieved by an *administrative* order to be entitled to judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, of the adverse *agency* action. The decisions in both cases can fairly be said to represent a trend 'toward enlargement of the class of people who may protest administrative action' where statutes are concerned. *Data Processing Service,* 397 U.S. at 154, 90 S.Ct. at 830. Since we are concerned with the issue of whether charging parties have the right to obtain appellate review from a judicial order in a § 10(1) proceeding and not the right of judicial review of administrative action, *Data Processing* and *Barlow* are not controlling." (440 F.2d at p. 132) [Emphasis in original]

Parkmerced is a privately owned and privately financed complex which operates without government assistance or involvement and cannot be characterized as acting for any level of government.[31] Further, Parkmerced neither assumes nor performs obligations of the state, such as fire, safety or health care, nor opens itself to unrestricted public access so as to take on the character of a municipality or public facility.[32]

2. Cases In Which The Plaintiffs Have Suffered Direct Personal Injury Cognizable Under The Relevant Statute

Petitioners also rely upon cases in which the particular persons claiming standing, whether or not themselves members of the minority group discriminated against, suffered

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31. Compare *Browns v. Mitchell,* 409 F.2d 593 (10th Cir. 1969); Cf. *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

32. *Lloyd Corp., Ltd. v. Tanner,* ..... U.S. ..... [40 U.S.L.W. 4829], (June 22, 1972); Compare *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.,* 391 U.S. 308 (1968); *Marsh v. Alabama,* 326 U.S. 501 (1946).

direct personal injury of the kind which the statute involved sought to prevent. For example, petitioners cite cases where white persons were denied the use of public accommodations because they were in the company of Negroes,[33] or were summarily ejected from their apartment because they invited Negroes as their guests,[34] or were expelled from a community club because they conveyed property to a Negro,[35] or were subjected to a civil action for damages because they sold property to a non-Caucasian in violation of a legally unenforceable racial covenant.[36]

Petitioners in the case at bar do not allege a similar direct, personal injury to them resulting from the discriminatory housing practices described in the complaint. They complain of the generalized impact upon them and the rest of the community of an asserted racial imbalance which they find unacceptable.[37]

In *Sierra Club v. Morton*, ... U.S. ....., 92 S. Ct. 1361 (1972), this Court emphasized that:

> ". . . a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."
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> "The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial

33. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949); *Tolg v. Grimes*, 355 F.2d 22 (5th Cir.), *cert. den.*, 384 U.S. 988 (1966); *Offner v. Shell's City, Inc.*, 376 F.2d 574 (5th Cir. 1967).

34. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969).

35. *Sullivan v. Little Hunting Park*, 396 U.S. 230 (1969).

36. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1947).

review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process." (92 S. Ct. at pp. 1368-69).

3. Cases In Which Plaintiffs Are Permitted To Assert The Rights Of Absent Third Parties Who Are Otherwise Denied A Forum

Petitioners cite several cases in this category.[37] They should not be permitted to assert the rights of third parties because petitioners do not bear a professional, fiduciary or similar relationship to those whose rights they assert, and the third parties are neither denied a forum nor disqualified from suit. They have in fact brought suit (*Burbridge, et al. v. Parkmerced Corporation, et al.*, discussed at pp. 5-6, *supra*).

While the disqualification of a party to assert the rights of absent third parties has been characterized as this Court's ". . . self-imposed rule . . ." (*Eisenstadt v. Baird*, ... U.S. ....., 92 S. Ct. 1029, 1034 (1972), this Court has

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37. The general nature of petitioners' complaints is illustrated by the affidavit of Dr. Poussaint upon which they rely for explanation of the injuries to them. (Pet. Br., pp. 13-14; the Poussaint Aff. is annexed as App. E to Pet. Br.) Dr. Poussaint is a psychiatrist residing in Massachusetts who apparently has never spoken to any of the petitioners, or any other Parkmerced residents, nor seen the Parkmerced property. His affidavit comments on the social harm to the society at large from racial imbalance. The affidavit which was submitted on a motion and not as part of a pleading, does not provide concreteness or specificity to the complaint.

38. *Eisenstadt v. Baird*, ... U.S. ....., 92 S.Ct. 1029 (1972); *Barrows v. Jackson*, 346 U.S. 249 (1953) (See Pet. Br., pp. 27-28).

rogated the rule only where the claimants were directly injured by the denial of rights, the party bore a particular relationship to the holders of the right (e.g., doctor-patient), and such holders were, by applicable law or otherwise, disabled from suit in their own behalf or denied a forum for the assertion of their rights.[39] For example, in *Eisenstadt*, the appellee Baird had established himself as an advocate to challenge Massachusetts' criminal laws limiting the distribution of contraceptives and had been convicted of criminal violation of those laws. This Court emphasized that potential users of contraceptives were not subject to prosecution and ". . . to that extent, are denied a forum in which to assert their own rights." (92 S. Ct. at p. 1034).

Similarly, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the defendant asserting third party rights was Executive Director of the Planned Parenthood League of Connecticut and a licensed physician who had prescribed contraceptives and had been convicted as accessory to the crime of using contraceptives under Connecticut law. In *Barrows v. Jackson*, 346 U.S. 249 (1953), a party had sold land to a non-caucasian and was subjected to a damage action for breach of a racially restrictive covenant.

Compare *Tileston v. Ullman*, 318 U.S. 44 (1943), holding that a physician, who had not been prosecuted under the Massachusetts contraceptive laws but claimed he feared such prosecution, does not have standing. This Court questioned whether plaintiff presented a ". . . genuine case or controversy essential to the exercise of the jurisdiction of this Court" (318 U.S., at p. 46). *Tileston* was cited with ap-

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39. *Eisenstadt v. Baird, supra; Griswold v. Connecticut*, 381 U.S. 479 (1965); *Barrows v. Jackson*, 346 U.S. 249 (1953); Cf. *Tileston v. Ullman*, 318 U.S. 44 (1943); *Younger v. Harris*, 401 U.S. 37 (1971).

proval in the recent *Eisenstadt* decision of this Court, and has been followed by lower courts.[40]

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court considered the standing of intervenors who claimed that the California Criminal Syndicalism Act inhibited their freedom of speech as members of The Progressive Labor Party and college instructors. This Court held that Harris, who had been indicted under the Act, presented ". . . an acute, live controversy with the State and its prosecutor" (401 U.S. at p. 41), but denied standing to intervenors because they were not subject to imminent prosecution and they did not present a "genuine controversy" (401 U.S. at p. 42).

4. Cases Arising In The Areas Of Public Accommodations And Labor Relations Under Statutory Schemes Unlike Title VIII

Petitioners refer to cases arising under laws forbidding discrimination in public accommodations and to labor relations cases (Pet. Br., pp. 26-27). These cases involved claimants whose direct, personal injury was clear and, in any case, arose under statutes which are wholly unlike Title VIII.

For example, *Bailey v. Patterson*, 369 U.S. 31 (1962), held that passengers in segregated public facilities had standing to enforce a right to non-segregated treatment. The section of the 1964 Civil Rights Act applicable in *Bailey* provides:

> "All persons shall be entitled to the full and equal enjoyment . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." (42 U.S.C. § 2000a(a)).

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40. E.g., *Meyer v. Massachusetts Eye and Ear Infirmary*, 330 F. Supp. 1328 (D. Mass. 1971), in which a staff doctor was denied standing to raise the rights of private and clinic patients in the hospital.

This Section clearly grants a right to "all persons" to enjoy public accommodations "without discrimination or segregation". No comparable right is created by Title VIII. In most of the public accommodation cases cited by petitioners, the plaintiffs had in fact been directly injured by exclusion or harassment.[41]

Petitioners also misplace their reliance on labor and employment cases.[42] A number of the cases establish no more than the proposition that an employer's racial policies are proper subjects for collective bargaining and negotiation and that an employee's rights to such bargaining and negotiation are protected by the labor laws.[43] In many of these cases, the direct, personal injury to the complainant was clear, in that he had been in fact excluded or discharged from employment.[44]

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41. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Offner v. Shell's City, Inc.*, 376 F.2d 574 (5th Cir. 1967); *Tolg v. Grimes*, 355 F.2d 92 (5th Cir.), *cert. den.*, 384 U.S. 988 (1966); and *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963). The latter case arose under 42 U.S.C, § 1983.

42. *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970).

43. E.g., *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965), construing Section 7 of the National Labor Relations Act, 29 U.S.C. § 157; Cf. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), applying the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 107(a-e), 113 (a-c), to protect picketing by non-employees.

44. *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971); *N.L.R.B. v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965); *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir.), *cert. den.*, 400 U.S. 951 (1970). The facts of *Carr* illustrate the deficiencies in petitioners' standing here: the *Carr* plaintiffs had been excluded from employment and brought a class action on behalf of themselves and all others (including employees) discriminated against. The individual plaintiffs' standing was not at issue, and the sole question before the court was the propriety of the class, which the court upheld (423 F.2d at pp. 62-66).

Cases in the labor relations area are affected by a national labor policy inapplicable to the case at bar. The policy of our labor laws, formed and developed over many years, has been to substitute arbitration and collective bargaining for industrial strife. Mr. Justice Harlan characterized the collective bargaining agreement as:

> ". . . [A] generalized code to govern a myriad of cases. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964), quoting *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).

As a result of these policies, courts have given the greatest breadth to the "terms and conditions" of employment which may properly be made part of bargaining. The fair employment provisions of the Civil Rights Act of 1964 are phrased in terms far broader than Title VIII and do not provide an accurate analogy.[45]

II. Standing To Maintain Suit Under 42 U.S.C. § 1982 Is Limited To Those Directly Injured By The Claimed Violation

The terms of 42 U.S.C. § 1982 are declaratory and very broad:

> "Section 1982. *Property rights of citizens.* All citizens of the United States shall have the same right, in

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45. It is declared unlawful:
"[T]o fail or refuse to hire or to discharge any individual or *otherwise to discriminate* . . ." (42 U.S.C. § 2000e-2(a)(1)); "[T]o fail or refuse to refer for employment or *otherwise discriminate* . . ." (42 U.S.C. § 2000e-2(b)); "[T]o exclude or to expel from its membership, or *otherwise to discriminate* . . ." (42 U.S.C. § 2000e-2(c)); and with respect to training programs, "[T]o *discriminate* against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." (42 U.S.C. § 2000e-2(d)) (emphasis added).

every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

Its applicability to a given situation can only be determined by examining the instances in which rights have been upheld under its provisions.

This Act has been construed to provide standing to a Negro person refused the right to purchase or lease property on the basis of race, *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968), *Harris v. Jones*, 296 F. Supp. 1082 (D. Mass. 1969); to a white person expelled from membership in a community pool club because he rented property and assigned membership rights to a Negro, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and to white persons summarily evicted from leased premises because they entertained Negro guests, *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969). However, we have found no case which purports to confer standing under 42 U.S.C. § 1982 to persons in petitioners' position—i.e., those not the direct objects of, or directly affected by, a violation of the act.

All of the petitioners here are themselves tenants of Parkmerced. None of them has been denied the right to lease or hold real property which the Act by its terms provides. The petitioners base their complaints under 42 U.S.C. § 1982 upon the identical factual allegations of the claims of discriminatory housing practices in violation of Title VIII (see pp. 4-5, *supra*). As discussed in the preceding portions of this brief, these petitioners lack the direct, personal interest or concrete adversity upon the issues to be determined sufficient to confer upon petitioners standing to litigate the alleged denial of the rights of others. In addition, such litigation would be inconclusive, in that the

persons whose rights allegedly were deprived are not present and would not be bound by the result.

III. Dismissal Of The Complaints Against Parkmerced Corporation Should Be Affirmed On The Additional Ground That Parkmerced Corporation Did Not Participate In The Alleged Violations And Cannot Be Compelled To Litigate, Or Be Held Liable For, Alleged Misconduct of Metropolitan

As stated at pp. 6-7, *supra*, Parkmerced Corporation acquired the Parkmerced complex from Metropolitan on December 21, 1970, many months after the filing of the complaints herein. Petitioners moved the joinder of Parkmerced Corporation as a defendant pursuant to F.R.Civ.P. 25(c), and in opposition to joinder and in support of its subsequent motion to dismiss the complaints,[46] Parkmerced Corporation contended that the petitioners had not shown facts sufficient to warrant the court's requiring Parkmerced Corporation to endure the risks, dislocations and expense of this litigation, or be subject to affirmative or other relief. In their amended complaints, petitioners assert that Parkmerced Corporation ". . . is legally obligated to take . . . affirmative action . . ." to correct the effects of the alleged discriminatory housing practices followed by Metropolitan and to desist from any practice which would continue the effects of past discriminations (Pet. Br., App. D, para. 5 at p. 3).

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46. Parkmerced Corporation's joinder under F.R.Civ.P. 25(c) was ordered by the District Court on December 30, 1970. As ordered by the Court, on January 5, 1971, petitioners filed an amendment to their complaints purporting to state a cause of action against Parkmerced Corporation (set forth as Appendix D to petitioners' brief). Thereafter, Parkmerced Corporation filed its motion to dismiss the complaints on two grounds: first, that petitioners lacked standing to sue; and second, that the amended complaints failed to state a cause of action against Parkmerced Corporation (F.R. Civ. P. 12(b)(6)). In their opinions below, neither the District Court (App. 1-3) nor the Ninth Circuit Court of Appeals considered the latter ground for dismissal (Pet. Br., App. A, fn. 4 at p. 2).

The basis upon which petitioners would require Parkmerced Corporation to be joined and be subject to injunctive relief is that Parkmerced Corporation, prior to its purchase, had notice of petitioners' charges. Petitioners also advance the patently insubstantial grounds that, during the two-week interval between Parkmerced Corporation's purchase and the filing of the amended complaints, no "substantial change in the business operations" was effected, and that the Parkmerced tenants were advised at the time of the sale that there would be no change in the Parkmerced staff (App. D. to Pet. Br.). (See pp. 6-7, *supra*).

A. PARKMERCED CORPORATION WAS UNCONNECTED WITH METROPOLITAN'S CONDUCT, AND HAS ASSUMED FULL OPERATIONAL CONTROL INDEPENDENT OF METROPOLITAN

Parkmerced Corporation had no connection of any kind with the rental policies and procedures followed by Metropolitan at the Parkmerced complex during the complaint period. There is no basis in fact for an assertion (and no assertion is made) that Parkmerced Corporation (or its promoters, incorporators, or stockholders) at any time influenced Metropolitan's pre-complaint conduct, or that the sale of Parkmerced was a "sham" transfer or was in any way motivated by a desire to avoid or frustrate enforcement of civil rights. Parkmerced Corporation paid full value for the Parkmerced properties and, upon the closing of the sale on December 21, 1970, it assumed complete and independent operating control. Metropolitan has had no responsibility for operating and rental policies of the Parkmerced property after that date. None of the policies or practices which Parkmerced Corporation is alleged to have continued after the purchase is itself claimed to be a discriminatory housing practice in violation of Title VIII or 42 U.S.C. § 1982.

B. TITLE VIII AND 42 U.S.C. § 1982 SHOULD NOT BE APPLIED TO BURDEN PURCHASERS UNCONNECTED WITH THE ALLEGED DISCRIMINATORY CONDUCT

The vice of the compulsory joinder of Parkmerced Corporation is that it is forced to endure the risks, dislocation and expenses of the trial of factual and legal issues in dispute between petitioners and Metropolitan, which are wholly foreign to Parkmerced Corporation. Parkmerced Corporation simply has no knowledge of the facts and cannot reasonably be expected to defend another's conduct, most particularly where the motive, intent and purpose of such conduct are at issue. The litigation promises to be protracted. Metropolitan has denied wrongdoing and undoubtedly will continue to do so. Parkmerced Corporation has been exposed to adverse periodical and newspaper publicity which prominently identifies it with the lawsuit. Petitioners have demanded broad affirmative relief to correct the alleged racial imbalance and remedy the effects of alleged past discriminations by Metropolitan. It is impossible to foresee what that relief might entail, or the adverse impact the relief might have upon Parkmerced Corporation, its operations and its financial prospects.

The practical consequences of a rule which permits or requires joinder of a disinterested purchaser simply because it has notice that charges of discriminatory housing practices have been made against the seller would be unwarrantedly severe. While such a purchaser can obtain indemnification by the seller against the direct costs of suit, as Parkmerced Corporation has done here, there is no practical means by which the purchaser can obtain protection or indemnification against the ill effects upon it of the protracted litigation, the adverse publicity, or the pervasive affirmative relief. It is impractical to suggest that a seller and purchaser in such a position might agree that, if the claimant should prevail, the purchaser would have the right

to "unwind" the transactions and restore the burden of affirmative relief to the seller. Complex real estate transactions involve the financial and tax planning and commitment of many entities and cannot be held in an uncertain status during years of litigation, or readily dismantled if the litigation result should be adverse. In effect, such a rule provides persons willing to launch civil rights complaints against a seller with the kind of leverage, by the mere filing of a complaint, that would be expected to frustrate and make impractical consummation of the real estate transaction.

Neither Title VIII nor 42 U.S.C. § 1982, by its terms, requires that affirmative relief be extended to an independent purchaser, such as Parkmerced Corporation. Both Title VIII and 42 U.S.C. § 1982 proscribe specific discriminatory conduct. Neither Act prescribes a kind or degree of integration, or racial, religious or other mixture which is sought or required for compliance. Parkmerced Corporation, or any other purchaser, is entitled to own and operate an apartment complex that is all White, all Negro, all Oriental—of any racial or ethnic character—so long as Parkmerced Corporation does not itself discriminate in violation of the Acts.

As an equitable matter, Parkmerced Corporation should not be required to remain a party to this litigation or be subjected to the threat of injunctive relief unless the petitioners allege in good faith and prove that it is an "instrumentality" or "alter ego" of Metropolitan, or that the sale to Parkmerced Corporation was a "sham", or made for the purpose of avoiding civil rights compliance. Mere purchase of assets of an entity charged with violation of the law will not, in itself, justify equitable relief against the purchaser. See *United States v. Johns-Manville Corp.*, 245 F. Supp. 74, 82 (E.D. Pa. 1965), in which the trial court

refused to enter injunctive relief against a purchaser of assets from a defendant found to have violated the antitrust laws. In discussing the propriety of entering an injunction forbidding securities laws violations against defendant corporate officials in their individual capacities, the Court of Appeals for the Tenth Circuit stressed the importance of participation in a wrong as a basis for imposing injunctive relief:

> "But also traditionally in equity, where there is a right to issue a general injunction in a situation, the court has the power inherently to impose upon any persons, who have contributingly played a part in the doing or committing of the enjoinable action involved (where they are made party to the suit), such reasonable and relevant individual restraint as may be necessary to enable the decree to accomplish its preventive purpose." *S.E.C. v. Barraco*, 438 F.2d 97, 98 (10th Cir. 1971).

The question of the proper scope and effect of an injunctive decree to bind successors in interest has been most often considered by courts in the context of F.R.Civ.P. 65(d).[47] A number of cases have indicated that an injunction may not bind a successor in interest unless the court finds that the successor is in "active concert" or "participation" with those against whom the injunction was entered or is availed of as a disguised continuance of the predecessor's. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945); *United Phar-*

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47. F.R.Civ.P. 65 (d) provides:
"(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

macal Corp. v. U.S., 306 F.2d 515 (1st Cir. 1962); Annotation, 97 AL.R.2d 490. While, unlike cases arising under this Rule, Parkmerced Corporation has been made a party in the proceeding for the injunction, the equitable principles to be applied should not differ.

We anticipate that petitioners will refer this Court to cases arisng in the labor relations area as authority for the assertion that a purchaser with notice properly may be bound to carry out collective bargaining agreements or remedy unfair labor practices of the seller. The trend of labor cases has been to hold successors in interest liable where the successor represents in practical effect the substantial continuance of the predecessor's enterprise.[48]

In contast to Title VIII and 42 U.S.C. § 1982 in question here, labor legislation reflects an unique national policy to regulate the broad employer-employee relationship. (See discussion at pp. 34-36, *supra*) In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), discussed at p. 36, *supra*, the Courtheld that a successor by merger was bound by a preexisting collective bargaining agreement. The Court emphasized the "... substantial continuity of identity in the business enterprise ..." as central to the decision. (376 U.S., at 551)

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48. Compare *U.S. Pipe & Foundry Co. v. N.L.R.B.*, 398 F.2d 544 (5th Cir. 1968) (holding that a purchaser *pendente lite*, with notice of charges against the predecessor is without more required to reinstate employees wrongfully discharged by seller), with *N.L.R.B. v. Birdsall-Stockdale Motor Co.*, 208 F.2d 234 (10th Cir. 1953) (holding that a purchaser is bound only if it bears a particular relationship with the seller, such as active participation in the wrongdoing, "disguised continuance" of the seller, instrumentality for evasion of an order, and the like). Cf. *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398 (1960), holding that the N.L.R.B. should be given the opportunity to prove relationships between seller and purchaser corporations to determine the enforceability against the purchaser of an order entered against the seller. The *Deena Artware* case suggests that only certain successors having particular relationships with the seller will be bound.

The practical effect of compelling a purchaser or successor corporation to carry out terms of a collective bargaining agreement, or to restore employment to specific persons who have claimed that they were wrongfully discharged, or to remedy specific claimed unfair labor practices, differs materially from the problem here. The purchaser in those situations is able to read and analyze the agreement by which he might be bound, and to review and assess the practical impact upon him of the claimed rights to employment or correction of prior practices. In contrast, Parkmerced Corporation has no notice of the particular persons who claim the right to apartments at Parkmerced and no practical means to assess the impact upon it of the broad affirmative relief which petitioners have demanded.

Moreover, Parkmerced Corporation is not in any real sense a "successor" to Metropolitan. The latter is a large, well-established company whose affairs are barely affected by the Parkmerced sale. Metropolitan is fully capable of defending its conduct and of responding in damages if a violation be found.

For these reasons, it is our position that F.R.Civ.P. 25(c) does not contemplate the joinder of a purchaser in the position of Parkmerced Corporation. The Rule applies upon the ". . . transfer of interest . . ."[49] and has obvious application to the successor by merger, sale of substantially all assets, or transfer of rights to a trustee in bankruptcy. The Rule also has application where a third party obtains an interest in the subject matter of the action, as by an assignment, or by the acquisition of an interest

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49. F.R.Civ.P.25(c) reads:
"(c) TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

in the *res* in an *in rem* proceeding (see generally *Moore's Federal Practice*, § 25.08 (2d ed. 1969)). While petitioners have requested affirmative relief, the action in no sense involves the title to or ownership of the Parkmerced complex; Title VIII and 42 U.S.C. § 1982 do not provide for *in rem* proceedings against specific properties. These Acts proscribe particular kinds of conduct and their violation is in the nature of a tort for which recovery may be had only against the wrongdoer. In no sense has the purchase of Parkmerced resulted in Parkmerced Corporation's acquiring an "interest" in the subject matter of the action, or in Metropolitan, so as to warrant its joinder under F.R.Civ.P. Rule 25(c).

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the dismissal of petitioners' complaints herein on the ground that they lack standing to maintain suit on the causes of action stated in their complaints. Alternatively, we request that this Court dismiss the action against Parkmerced Corporation on the ground that petitioners have not shown a substantial basis for relief against Parkmerced Corporation.

Dated:
July 14, 1972,
San Francisco, California.

Respectfully submitted,

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(Appendices Follow)